

Shirley E. Hendley v. U.S. General Accounting Office

Docket No. 120-211-02-89 Date of Decision: November 19, 1990

Cite as: Hendley v. GAO (11/19/90)

Before: Paul A. Weinstein, Member

GAO Regulations

Performance Appraisal

Prohibited Personnel Practice

Notice

Merit System Principles

Timeliness

DECISION

Introduction This is a proceeding brought under the General Accounting Office Personnel Act ("GAOPA"), as amended, 31 U.S.C. Secs. 731- 755 (1988). Petitioner Shirley E. Hendley has filed a Petition for Review with the General Accounting Office Personnel Appeals Board alleging that the General Accounting Office committed prohibited personnel practices in conjunction with a performance appraisal Petitioner received in May, 1989.

Petitioner filed her Petition for Review on November 6, 1989, alleging that the subject performance appraisal was administered in violation of federal law and Agency rules and regulations. As relief, Petitioner requested that the performance appraisal be either destroyed or revised upwards.

A hearing was held in this matter on February 14-15, 1990. The parties submitted post- hearing briefs on April 5, 1990, and reply briefs on April 30, 1990, briefing the issues of law and fact. The parties were allowed to submit posthearing exhibits relative to the March 1988 schedules of the Petitioner and her supervisor. Petitioner submitted posthearing exhibits, and the Respondent did not reply to Petitioner's supplemental information. The record was closed on May 5, 1990.

I. Factual Background

Petitioner, a GS-13 Evaluator, began her career with GAO in May 1983. In January 1988, Petitioner transferred from GAO Headquarters in Washington, D.C. to the Boston Regional Office.

Petitioner's first relevant assignment on this tour in the Boston Regional Office (BRO) was to work as the BRO senior site evaluator on the Space Defense Operations Center IV Modernization Program ("SPADOC 4"). Petitioner was to work with a GAO team pulled from various offices, but operating through the Denver Regional Office. The work segment assigned to the Boston Regional Office centered at Hanscom Air Force Base in nearby Bedford, Massachusetts.

Petitioner's immediate supervisor on the "SPADOC 4" assignment was Fred Cross. He had never supervised Petitioner before. Cross was responsible for communicating to Petitioner the performance standards and critical elements for her assignment, and appraising Petitioner's performance pursuant to those performance standards and critical elements.

Petitioner supervised one person on the assignment, Robert Ballard, another GAO Evaluator. Petitioner was responsible for communicating Ballard's performance standards and critical elements to him, and appraising Ballard's performance pursuant to those performance standards and critical elements.

Petitioner's assignment on the "SPADOC 4" job ended on September 23, 1988, and Petitioner transferred back to Washington on November 20, 1988. On May 16, 1989, Petitioner received her final performance appraisal for the "SPADOC 4" assignment from Cross.

After receiving her performance appraisal, Petitioner filed an internal grievance with GAO, claiming that the performance appraisal was too low, and in violation of GAO regulations because it had been improperly prepared.

After exhausting her internal grievance procedures, Petitioner, represented by the PAB General Counsel, filed her Petition for Review, commencing this action before the Board.

II. Petitioner's Contentions

Petitioner contends that the GAO issued her May 16, 1989, performance appraisal in violation of a law, as well as a rule or regulation, which implements and directly concerns a merit system principle, and thus, GAO committed a prohibited personnel practice.

Petitioner contends that a prohibited personnel practice was committed in the first instance when her supervisor, Mr. Cross, failed to communicate the performance standards and critical elements of Petitioner's position to her at the beginning of the appraisal period. This violated 5 U.S.C. Sec. 4302, the Federal statute governing performance appraisals, and committed a prohibited personnel practice within the meaning of 5 U.S.C. Sec. 2302.

In the second instance, Petitioner maintains that, by not evaluating her performance until approximately eight months after the end of her appraisal period, Cross violated the GAO performance appraisal regulation, GAO Order 2430.1, and thus, committed another prohibited personnel practice.

III. Respondent's Contentions

Respondent contends that no prohibited personnel practices of any kind were committed. Respondent contends that Petitioner's supervisor, Fred Cross, and Petitioner met and discussed the specific tasks and responsibilities assigned to Petitioner on the "SPADOC 4" job, and this complied with all requirements of law and regulation in communicating to Petitioner the performance standards and critical elements of her position. Respondent further contends that there were written plans and guidelines given to Petitioner which detailed Petitioner's expected performance on that job.

Respondent asserts that Petitioner understood the performance standards and critical elements necessary for her performance appraisal because she had been appraised at least ten times under that same system, and that Petitioner had used that system to evaluate the performance of at least two subordinate

employees, one of them on the "SPADOC 4" job. As further evidence that no prohibited personnel practice occurred, Respondent cites the fact that twice during her appraisal period Petitioner stated to Agency officials that she had received performance standards and critical elements on the "SPADOC 4" job from her supervisor. Further, it contends that her statements at the one-third meetings made the system unworkable and therefore, Petitioner was at fault if management took no curative action.

Finally, Respondent argues the Petitioner's late receipt of her performance appraisal was harmless error, since Petitioner did not request her appraisal until nearly six months after it was due. Further, Petitioner did not render a timely appraisal to her subordinate. Respondent argues that the mere fact that a performance appraisal is rendered late does not constitute a prohibited personnel practice, because the timeliness rule is a procedural rule that is neither mandatory nor concerns a merit system principle.

IV. Findings of Fact

1. Petitioner is a GS-13 Evaluator employed by GAO since May 1983, with a high record of advancement and achievement. (Tr. 58, Petitioner's Exhibit 8-14).
2. Petitioner transferred from GAO Headquarters in Washington, D.C., to the GAO Boston Regional Office (BRO) on January 4, 1988. (Tr. 43, 100, 202).
3. The BRO assigned Petitioner to the "SPADOC 4" Project on February 8, 1988. (Joint Exhibit 5).
4. Petitioner's role on the "SPADOC 4" assignment was as the site senior evaluator, (Tr. 43) and she supervised a GS-12 evaluator, Robert Ballard. (Tr. 175).
5. Petitioner's assignment on the "SPADOC 4" job ended on September 23, 1988, (Joint Exhibit 5) and on November 20, 1988, Petitioner transferred back to Washington, D.C., from the BRO. (Tr. 41).
6. Fred Cross was responsible for supervising and appraising Petitioner on the "SPADOC 4" job. (Joint Exhibit 5).
7. Petitioner was responsible for appraising the performance of Robert Ballard. (Joint Exhibit 6).
8. Cross first supervised Petitioner on the "SPADOC 4" assignment. (Tr. 43, 100, 207).
9. "Setting expectations" is the term used at GAO for the process by which performance standards and critical elements are communicated to GAO employees in compliance with Federal law and GAO regulations. (Joint Exhibits 1 & 2, BARS Manual & GAO Order).
10. GAO regulations, in conformance with Federal law, require that expectations be set for each employee at the beginning of the appraisal period. (Joint Exhibit 2, p.1).
11. Petitioner testified that at no time did Cross ever set expectations for her, or otherwise make her aware of the performance standards and critical elements that would be applied to appraise her performance on the "SPADOC 4" job. (Tr. 55-56).

12. Petitioner testified that she prepared an outline for the April 8, 1988, "one-third" progress meeting concerning the "SPADOC 4" job. In that outline she stated that her expectations had been set. (Tr. 67, Joint Exhibit 7). While at the one-third meeting, Petitioner responded affirmatively that her expectations had been set for the "SPADOC 4" job. (Tr. 69).

13. Petitioner admitted that she had signed an interim performance appraisal prepared by Cross and received by Petitioner in June 1988. That document stated that her expectations had been set by Cross on March 4, 1988. (Tr. 99-102).

14. Petitioner prepared an outline for a second one-third meeting held on July 8, 1988. On the outline, Petitioner affirmed that her expectations had been set. (Tr. 126, Respondent's Exhibit 8).

15. Petitioner received a final performance appraisal on the "SPADOC 4" job in May 1989. (Joint Exhibit p. 5, Tr. 42).

16. According to GAO Order 2430.1, performance appraisals are due within 20 days of the date a staff member is released from an assignment. Where an employee transfers from one GAO office to another GAO office, the employee's last performance appraisal must precede the employee's arrival at the new office. (Joint Exhibit 2, p. 9-10).

17. Petitioner prepared written expectations for Robert Ballard. (Tr. 84).

18. Petitioner prepared a final performance appraisal for Mr. Ballard on the "SPADOC 4" assignment. (Tr. 136, Respondent's Exhibit 1).

19. Fred Cross, Petitioner's supervisor, testified under oath in a deposition prior to the hearing in this matter, that he had set Petitioner's expectations on the "SPADOC 4" job in a meeting held on March 4, 1988. (Tr. 19-20).

20. Cross documented that Petitioner's expectations had been set on March 4, 1988, in Petitioner's interim appraisal. (Joint Exhibit 4).

21. Cross' deposition provided details of the expectations setting meeting with Petitioner on March 4, 1988. (Tr. 19-20).

22. At the hearing, Petitioner presented proof that she was not in the BRO at any time during the week of March 4, 1988, but instead, was in Washington, D.C. for a two week Presidential Classroom assignment. (Petitioner's Exhibits 1-4, Tr. 50, Stipulation of Respondent).

23. At the hearing, Petitioner proved that Cross was aware at the time that Petitioner was in Washington, D.C., during the two weeks ending the week of March 4, 1988, by introducing a time and attendance report Cross had filled out for Petitioner during Petitioner's absence from the BRO for those two weeks. (Petitioner's Exhibit 4, Tr. 28).

24. After being confronted with the evidence that he could not have met with Petitioner the week of March 4, 1988, Cross then changed the date of the alleged expectation setting meeting to March 7, 1988, the first day Petitioner was back in Boston after her two-week absence. (Tr. 13-39).

25. Cross made no notes for the expectation setting meeting with Petitioner. Cross cites specific provisions of the BARS Manual as applying to Petitioner's performance for her final performance appraisal. (Tr. 241, Joint Exhibit 5).

26. Cross had no records, notes, or recordations in a date book nor could he provide any details to show that he met with Petitioner on March 7, 1988. (Tr. 38).

27. Based on her date book, Petitioner reconstructed her activities of March 7, 1988, and concluded that she would have had no opportunity to have met with Cross on March 7, 1988. (Supplemental exhibit).

28. Cross could neither remember nor reconstruct any of his other activities on the day he claims to have set Petitioner's expectations. (Tr. 241).

29. Petitioner testified that she asked Cross to set her expectations on several occasions in 1988. (Tr. 90, 100-01, 129) Petitioner testified that on each occasion, Cross admitted that he had not set Petitioner's expectations but asked Petitioner to work with him. (Tr. 67-69, 91, 155, 157, 158).

30. Cross testified that Petitioner never told him that she did not have her expectations, (Tr. 35-187) and that he never asked Petitioner to cover up his omissions. (Tr. 192).

31. Cross testified that, in setting expectations for Petitioner, he reviewed with Petitioner the audit guidelines and assignment tasks and plans for the "SPADOC 4" job, and told Petitioner she would be rated under the BARS Manual. Cross said little else was required in the expectations setting process. (Tr. 179-89).

32. Cross testified that once an employee understands the tasks he or she is to perform on an assignment, it is the employee's responsibility to refer to the BARS Manual to determine at what level the tasks need to be performed in order to achieve a certain rating on the performance appraisal. (Tr. 214-15, 218) For that reason, Cross testified, he and Petitioner had no need to jointly review the provisions of the BARS Manual, including its grade level definitions, task inventory, performance level definitions, etc. (Tr. 208-12).

33. Cross testified that the BRO has no specific time frame when expectations have to be set, but that the BRO goal was to set expectations as early on the job as possible. (Tr. 213)

34. Cross' testimony reiterated that setting expectations means clearly communicating to the employee their tasks on an assignment and informing them that they will be rated in accordance with the BARS Manual. (Tr. 173, 214-15, 220).

35. Mort Myers, the BRO manager, did not testify at the hearing, but his testimony at a deposition conducted January 17, 1990, was admitted as part of the hearing record as a Joint Exhibit. (Joint Exhibit 10).

36. Myers' deposition offered that, in the expectation setting process, communication must occur between supervisor and subordinate so that they both understand and agree to the expectations for the employee's performance. (Joint Exhibit 10, at 15).

37. Myers testified that, because Cross was so tardy in delivering Petitioner's performance appraisal, he issued Cross an oral reprimand. (Joint Exhibit 10, at 20).

38. Myers testified that the expectations setting process involves the employee and supervisor agreeing on the tasks to be performed on a job, as well as the standards to be applied to the employee's performance. (Joint Exhibit 10, at 6).

39. Myers testified that the supervisors get the performance standards from the BARS Manual to apply to the employee's performance, and the employees will always know, from the BARS Manual, which standards apply to particular tasks. (Joint Exhibit 10, at 17).

40. Myers testified that supervisors need not communicate performance standards to employees during the expectations setting process because all BRO employees have copies of the BARS Manual, and therefore, once the employee is aware of the tasks assigned to him or her on a particular job, the employee's responsibility is to check the BARS Manual, and using the tasks assigned as references, determine what performance standards the supervisor will apply to the job. (Joint Exhibit 10, at 30-34).

41. Fred Cross testified that once Petitioner (or any employee) understands what tasks are expected of her (them) on a given assignment, that employee need only review the performance standards in the BARS Manual to determine what the employee must do to achieve a performance level that is fully satisfactory, superior, borderline, etc. (Tr. 216-18).

42. Cross testified that he spent approximately twenty (20) minutes using the BARS Manual six or seven days prior to meeting with Petitioner to set her expectations. (Tr. 230- 48).

43. Cross testified that he set Petitioner's expectations according to the BARS Manual standards and procedures, but without actually using the BARS Manual at the expectations setting meeting. (Tr. 208-11).

44. Under cross-examination, Cross could not recall the Performance Statements or Performance Standards for a GS-13 as stated in the BARS Manual. (Tr. 212).

45. Cross testified that he could not finish the preparation of Petitioner's performance appraisal because he was waiting to receive Petitioner's evaluation of Mr. Ballard in order to use Petitioner's appraisal of Ballard as input into his (Cross's) final appraisal of Petitioner's performance. (Tr. 199-200).

46. Petitioner resubmitted her performance appraisal of Ballard, dated October 4, 1988, on March 27, 1989. (Respondent's Exhibit 1).

47. Cross's recollection of the content of the "SPADOC 4" job was vague (Tr. 235- 47).

48. Hendley testified that she received little or no supervision from Cross on the "SPADOC 4" job (Tr. 45-47) and that she was forced to resort for guidance to Cross's superior on the job, who was in Denver. (Tr. 45-46).

V. The Statutory Framework For Performance Appraisal

Section 43 of Title 5 of the U.S. Code is known as the Federal Performance Appraisal Statute. In particular, Section 4302 of Title 5 requires that each federal agency develop one or more performance appraisal systems establishing performance standards which, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria, related to the job in question, for each employee. At the beginning of each employee's appraisal period, each employee must have the performance standards and critical elements of his or her position communicated to them. Each employee must then be evaluated during the appraisal period on the performance standards and critical elements communicated to them at the beginning of the appraisal period.

GAO's performance appraisal program is reduced to writing in a performance appraisal systems manual, which consists of three parts: Chapter 1 is the Performance Appraisal Concepts and Issues. Chapter 2 is the Performance Appraisal Policy and Procedures (GAO Order 2430.1). Chapter 3 includes the Appendixes (consisting of performance standards and instructions). Performance standards are published for approximately seventeen departments and classes of positions in GAO. The BARS Manual is the set of performance appraisal standards at issue in this case, and relates to evaluator and evaluator-related positions.

The GAO Order 2430.1 is the GAO policy and procedures regulation for the GAO performance appraisal program. The GAO policy on performance appraisal is stated in 2430.1 as follows:

POLICY. As required by the GAO Personnel Act of 1980, GAO must develop one or more performance appraisal systems which provide for periodic review of employees' job performance; allow employees to participate in establishing performance standards; and use the results of performance appraisals as a basis for personnel actions such as promoting, training, retaining, rewarding, reassigning, reducing in grade and removing employees. Each appraisal system must:

- a. Establish performance standards which accurately measure performance on the basis of job-related criteria.
- b. Communicate to each GAO employee the performance standards and the critical elements for each employee at the beginning of the rating period.
- c. Provide for evaluating employees according to established performance standards at least annually.
- d. Recognize and reward employees according to performance.
- e. Help employees improve unacceptable performance.
- f. Provide for reassignment, reduction in grade, or removal of employees who, after having a chance to demonstrate acceptable performance, continue to perform unacceptably.

(Joint Exhibit 2, at 1-2). GAO Order 2430.1 defines performance standards and critical elements as follows:

PERFORMANCE STANDARDS

Performance standards are management's expressed level of achievement expected by management for the functions of the position. Performance standards as a minimum will be established at the "minimally acceptable," "borderline," or "met expectations" rating levels depending on the performance appraisal system. Standards may be expressed in two basic ways, or a combination of both.

- (1) Performance requirements generally expressed in terms of quantity, quality, timeliness, and similar evaluation elements related to continuing and recurring job functions or processes; and/or
- (2) Performance objectives generally expressed in terms of objectives or expected results and

deadlines related to the purpose of the employee's position. (Joint Exhibit 2, at 3).

CRITICAL ELEMENTS

Critical element means a component of an employee's job that is of sufficient importance that performance below the minimum standards established in a job dimension, job category, or accomplishment requires remedial action and denial of a within-grade increase and may be the basis for removing, or reducing the grade level of, the employee. Such action may be taken without regard to performance on other components of the job. (Joint Exhibit 2, at 4).

Performance rating and appraisal are synonymous in the Order 2430.1, and are the objective rating or comparison of "how an employee's actual [performance or] achievement compares with the established performance standards." (Joint Exhibit 2, at 5).

Order 2430.1 also sets forth the responsibilities of rating officials with respect to performance appraisals.

The rating official is that person designated as the employee's immediate supervisor and is responsible for preparing the appraisal form. Specifically these responsibilities include:

- a. Establishing expectations with employees to determine the critical elements, performance standards, accomplishments, and other components of the performance appraisal system. The determination of these expectations can either be done verbally or in writing.
- b. Discussing those elements, standards, and accomplishments with the employee at the beginning of the appraisal period and updating them during the appraisal period to reflect changes in position duties and responsibilities.
- c. Monitoring performance of subordinates and providing feedback concerning their performance.
- d. Appraising performance at the end of the appraisal period in accordance with previously established performance standards.
- e. Making developmental suggestions to increase efficiencies or correct deficiencies. (Joint Exhibit 7-8).

BARS Manual

The BARS Manual is that part of the GAO performance appraisal system which delineates the standards and procedures for rating evaluators and evaluator-related positions. The BARS Manual speaks to three phases of the performance appraisal cycle: (1) setting expectations, (2) monitoring performance, and (3) performance appraisal. (Joint Exhibit 1, at 1)

Setting Expectations

Setting expectations is the process by which employees, at the beginning of the rating period or assignment, are given a "clear understanding" of "what performance will be expected" of them during the rating period. (Joint Exhibit 1, at 1). As a matter of policy, GAO has not prescribed whether expectations should be in writing or verbally communicated. Id. Instead, the specific method is left to the "discretion" of the individual supervisor. Id. Regardless of how expectations are set, the BARS Manual regards it important that, at the beginning of the appraisal period, the supervisor and employee clearly understand:

What specific tasks or responsibilities are being assigned.

What outputs are expected to be produced.

What the outputs are expected to contain or cover.

The time frames in which the outputs are expected to be delivered.

The standards against which the outputs and the individual's performance will be judged. (Joint Exhibit 1, at 1).

The BARS Manual contemplates that, whenever new tasks are assigned, or the objectives of existing tasks or duties are revised, expectations will be reestablished.

The following procedure is stated in the BARS Manual as the process for setting expectations:

Grade Level Role Definitions: The supervisor and employee should first review the typical duties at the appropriate grade levels (GS-7 through 14) as "the starting point for a discussion of the characteristic tasks and responsibilities to be assigned to the staff member." (Joint Exhibit 1, at 2). Characteristic tasks are usually taken from the Task Inventory.

Task Inventory

The tasks in the Tasks Inventory are grouped into eight job dimensions:

Planning,

Data Gathering and Documentation,

Data Analysis,

Written Communication,

Oral Communication,

Administrative Duties,

Working Relationships and Equal Opportunity, and

Supervision

The Task Inventory is annotated to show which tasks are typical for most employees at each grade level. "[U]sing the Task Inventory as a checklist, the rater's job" is to identify "those tasks in the inventory that should be done during the assignment or rating period, indicating which are most important" to the assignment. (Joint Exhibit 1, at 2).

Qualitative expectations are set by using the Performance Level Definitions as a "cross-check" to the Performance Statements. The five Performance Level Definitions are Unacceptable, Borderline, Fully Successful, Superior and Exceptional. (Joint Exhibit 1, at 3).

Performance Statements are task specific examples of performance and define the level of performance in work terms. Performance statements describe an employee's typical behavior warranting a rating at a particular level. For example, in order to attain a Superior rating in a given set of tasks, the employee must exceed those performance characteristics described at the Fully Successful level for his grade and predominantly perform at the Superior level. An Unacceptable level of performance implies that an employee's predominant performance neither meets the Fully Successful nor the Borderline standards. (See Joint Exhibit 1, at III, 1-3 (Performance Level Definitions)).

VI. Analysis

With the above factual and legal framework in place, three issues must be resolved. The first is whether a meeting between Petitioner and her supervisor actually took place wherein the supervisor set expectations for Petitioner's assignment. If I find that such a meeting actually occurred, then I must decide if the expectations complied with the requirements of 5 U.S.C. Sec. 4302 and GAO Order 2430.1. If I find that a meeting did not occur, I must still determine if expectations were set in compliance with the procedures outlined by GAO Order 2430.1 and within the meaning of 5 U.S.C. Sec. 4302. Finally, I must decide if the failure of Respondent to deliver Petitioner's performance appraisal in a timely fashion constituted a prohibited personnel practice within the meaning of 5 U.S.C. Sec. 2302. For the purposes of resolving these issues with the utmost clarity, I shall deal with the issue of proper communication of performance standards and critical elements first.

A. Were Petitioner's Performance Standards Communicated

Respondent contends a meeting was held between Petitioner and her supervisor in which the supervisor set Petitioner's expectations--that is, communicated to Petitioner the performance standards and critical elements by which her performance would be appraised--on the "SPADOC 4" assignment. Assuming, arguendo, that such a meeting was held, I will now view the record evidence to see if, in fact, expectations could have been properly set in an alleged meeting.

Respondent points out several facts that, in Respondent's view, clearly prove that Petitioner was given her expectations for her assignment in a manner that complied with both the performance appraisal statute and GAO Order 2430.1. First, Respondent contends that Cross told Petitioner that she would be rated under the BARS system. Second, Petitioner admitted in her testimony that she knew that she would be rated using the BARS standards. Third, Petitioner received an interim rating that was written using the BARS standards. Fourth, Petitioner knew enough about the BARS system to rate her subordinate using the BARS Manual. Fifth, Petitioner had a copy of the BARS Manual in her possession at all times during her stint in the BRO. Sixth, Petitioner had been rated several times previously under the BARS system.

Respondent supports this argument with the testimony of both Fred Cross and Mort Myers, who both stated on the record that the expectation setting process, as they see it and as customarily occurs in the Boston Regional Office, requires virtually no responsibility by the manager to inform the employee as to how the employee should perform or how the employee's performance will be appraised. Cross and Myers both testified that an employee can, and should be able to, figure out their own performance standards and critical elements from an unsupervised reading of the BARS Manual. Respondent cites Cross v. Department of Air Force, 25 M.S.P.B. 353 (1984), aff'd, 785 F.2d 320 (Fed. Cir. 1985), as authority for their argument. Cross held that even when an employee is given a performance plan with absolutely no discussion of the performance standards and critical elements of the employee's position,

communication has occurred within the meaning of 5 U.S.C. Sec. 4302 as long as the employee understands the performance standards and critical elements of his or her position.

Cross is inapplicable to the instant case, however, because the performance plan given to the employee in that case contained written performance standards and critical elements, and they were the exact same performance standards and critical elements the employee had worked under for several years. Moreover, the employee in Cross admitted that she understood clearly those performance standards and critical elements of her position, and she also admitted that she was well aware of the precise deficiencies of her performance that led to her being placed under an opportunity period. The facts in Cross also showed that, after it was discovered that the employee's supervisor had not discussed the performance plan with her at the onset of the opportunity period, she was given a new opportunity period, and the supervisor then discussed the performance standards and critical elements with her at the beginning of the new opportunity period. Thus, any deficiency of the earlier opportunity period was cured under the new period.

The crucial fact in this matter is communication. Respondent urges me to find that as long as Petitioner had a copy of the BARS Manual, understood the BARS system, and was told she would be evaluated under BARS, communication has occurred within the meaning of the statute and GAO Order. However, the fact that Petitioner is familiar with BARS, and has been rated under BARS previously, does not satisfy the mandate of the statute and the regulation that communication must occur. GAO Order 2430.1 explicitly states that it is the responsibility of the rating official to [e]stablish expectations with the employee to determine the performance standards, critical elements, accomplishments, and other components of the performance appraisal system, and to discuss these with the employee at the beginning of the appraisal period. Order 2430.1, Ch. 2, Sec. 3. This communication cannot be achieved by having the BARS Manual available exclusively. The use of the words "establish with" and "discussing ...with" the employee makes it clear that an interactive form of communication is required.

Respondent's argument that Petitioner had many years of experience with BARS and had herself set expectations under BARS is equally unpersuasive. That fact, while unassailable, is nevertheless insufficient to satisfy the standards of Order 2430.1. Petitioner had not worked in the BRO for many years. Further, she had never had Cross for a supervisor before. And the "SPADOC 4" was an important and complex project that required significant planning in order to set and prioritize the research objectives. The Congressional objective behind the performance appraisal statute was not to have employees read a manual as detailed as BARS and then try to guess which performance standards and critical elements their supervisor will apply, and with what weight, on a particular assignment, independent of the relative complexity or simplicity of a project. The procedures contemplated by GAO Order 2430.1 and its BARS appendix are that the supervisor and employee will work together, and jointly review the tasks, performance statements, etc., in order to come to a mutual understanding of the standards and critical elements by which the employee's work will be evaluated.

Respondent also argues that, even if the procedures outlined in GAO Order 2430.1 and the BARS Manual were not followed, no prohibited personnel practice occurred, because the BARS Manual and GAO Order 2430.1 are not rules or regulations. I disagree. The plain language of 5 U.S.C. Sec. 4302, as incorporated by the GAO Personnel Act of 1980, 31 U.S.C. Sec. 732 (d)(1), requires the Comptroller General to adopt regulations implementing a performance appraisal program for GAO employees. GAO Order 2430.1 is the regulation adopted by the Comptroller General to comply with that statutory obligation. GAO Order 2430.1, Ch. 1, Sec. 1. The BARS Manual is that appendix to the GAO performance appraisal program which specifies the performance appraisal procedure for evaluators and evaluator-related positions. GAO

Order 2430.1, Appendix 1, Ch. 3-I. Thus, either the BARS Manual and GAO Order 2430.1 are regulations implementing the statute, or the Agency may be in violation of the statute by not having such regulations.

While I agree with Respondent that all of the procedures outlined in the BARS Manual are not mandatory, I find that the Order and the BARS Manual are regulations, and are mandatory with respect to those procedures which fulfill the requirements of 5 U.S.C. Sec. 4302. This mandates that performance appraisal programs must be adopted by regulation, and such programs must ensure that employees' performance standards and critical elements of their positions are communicated to them at the beginning of their appraisal periods. Clearly, the statute and the regulations mandate communication which involves the employee and the supervisor mutually agreeing to and understanding the precise performance expected of the employee, and the standards and critical elements by which the employee's performance will be evaluated. The BARS Manual, therefore, is tantamount to a cookbook, containing ideal recipes for setting expectations and appraising performance. In this case, any failure by the Respondent to include those basic system ingredients which insure that the employee understands the exact performance standards and critical elements by which their performance is to be appraised would constitute the violation of the performance appraisal statute and Order. It would therefore be a prohibited personnel practice under 5 U.S.C. Sec. 2302(b)(11), violating 5 U.S.C. Sec. 4302, applied to GAO by 31 U.S.C. Sec. 732(d)(1).

B. Was There an Expectation Setting Meeting

Based on the framework discussed above, we must now decide whether or not a meeting took place between Petitioner and her supervisor wherein the supervisor communicated to Petitioner the performance standards and critical elements to be applied to Petitioner's performance on the "SPADOC 4" job, and whether such communication, if any, complied with the requirements of 5 U.S.C. Sec. 4302. Whether such a meeting occurred must be discussed within the context of very conflicting stories offered by the Petitioner and her supervisor. Petitioner insists that no such meeting took place. Her supervisor, Mr. Cross, is equally insistent that the meeting did occur, and that what transpired in the meeting was sufficient to satisfy the requirements of 5 U.S.C. Sec. 4302 and GAO Order 2430.1. No matter whose story is to be believed, I nevertheless feel that veracity has taken some very hard licks throughout this process.

Based on the totality of the evidence, however, I find Petitioner's version of the facts to be more credible than that of Mr. Cross, for the following reasons:

1. Petitioner was able to give a fairly detailed account of her activities on the "SPADOC 4" job, as well as the events relevant to the two conflicting dates on which Cross alleged he met with Petitioner to set expectations, etc. The materials submitted by Petitioner with respect to the March 4 and 7 dates were corroborative of her testimony in this regard. Respondent was given an opportunity to challenge these post-hearing submissions of Petitioner, and did not.
2. Cross, on the other hand, gave conflicting testimony as to the dates the critical meeting took place. During his deposition, Cross testified with certainty that he met with Petitioner to set expectations on March 4. He was able to give details as to the time and what occurred in the meeting. However, even after Cross learned that Petitioner was in Washington, D.C. on March 4, and therefore could not have met with him in Boston, Cross was still unable to provide any credible evidence to support his testimony that the meeting must have therefore occurred on March 7.

3. Cross testified that he managed a total of five audit projects during the period he supervised Petitioner. However, he further testified that he kept no records of his activities on any of those projects; neither diaries nor log books. Cross claimed to have committed these matters to memory, but his recollections of the subjects were neither clear nor persuasive.

4. Cross testified at times with great detail regarding the specific activities that he undertook prior to the alleged expectation meeting with Petitioner. However, he was unable to recall any substantive details of the "SPADOC 4" project itself, and could not recall the priorities of the assignment. His assigning the priorities of a job as complex as the "SPADOC 4" project would be an indispensable element in defining the tasks, critical elements, and performance standards relevant to Petitioner's work on "SPADOC 4".

5. Cross provided detailed BARS Manual references on Petitioner's performance appraisal, but in his testimony during the hearing, he could not remember details about the BARS Manual, nor could he recall any specifics about the expectations setting meeting he allegedly held with Petitioner.

I find that Cross never met with Petitioner nor communicated the performance standards and critical elements of Petitioner's "SPADOC 4" assignment to her. I am nevertheless disinclined to provide any relief to Petitioner on this issue because of her complicity in the matter. Although it was Cross's responsibility to set expectations for Petitioner's assignment, Petitioner must share in the blame for her not receiving expectations. Petitioner prepared two documents stating -- and she subsequently orally confirmed -- that her expectations had been set. Petitioner also signed an interim performance appraisal prepared by Cross stating that her expectations had been set on March 4, 1988. Petitioner played with and deceived the system and in her testimony attempted to cover her actions. As a consequence of her statements and acts I cannot find that she is entitled to relief on this basis.

If the system of performance appraisal as envisioned by Congress and designed by GAO is to work, all individuals involved in the process must take their roles seriously and be honest. In this case, by "going along to get along" Petitioner has failed the system in much the same manner as the system has failed her. Thus, Petitioner should not recover when she, too, is guilty of wrongdoing.

That point is moot, however, because I find that Petitioner can recover on the issue of the timeliness of her performance appraisal.

B. The Lateness of Petitioner's Performance Appraisal

GAO Order 2430.1 requires that end of assignment appraisals must be rendered within 20 days of the release date of the employee to be evaluated. GAO Order 2430.1, Ch. 3, Sec. 2(a)(1). The Order also requires that when a staff member transfers to a new unit, it is the responsibility of the employee's old unit to ensure that the employee's performance files are delivered to the head of the new unit by the date the new employee is to enter on duty. Ch. 3, Sec. 6(e). The undisputed facts on this record show that the Petitioner's end of assignment appraisal for the "SPADOC 4" project was not prepared by Mr. Cross until eight months after Petitioner was released from the "SPADOC 4" project at the Boston Regional Office. Even after Petitioner's new supervisor in Washington, D.C., contacted the BRO requesting Petitioner's performance appraisal, it took an additional six weeks for the performance appraisal to be submitted.

With respect to the timeliness issue, Respondent poses two arguments. First, Respondent contends that Petitioner's performance appraisal was delayed because Cross was waiting for Petitioner to submit her appraisal of Robert Ballard, her subordinate on the "SPADOC 4" job, as input into Cross's overall evaluation of Petitioner. Petitioner testified that she sent Ballard's evaluation to Cross in October 1988, and Respondent's Exhibit 1, introduced during Respondent's cross-examination of Petitioner, corroborates Petitioner's testimony in that regard by showing that Petitioner submitted Ballard's appraisal on October 4, 1988. That date is only slightly later than the 20 days mandated by GAO Order 2430.1, in no way justifying an eight-month delay by Cross.

After being told in early 1989 that the BRO did not have a copy of the October 1988 appraisal of Ballard, Petitioner then sent a second copy of the Ballard appraisal to the BRO in March 1989, and it still took two months and intervention by her Headquarters supervisor, for Petitioner to receive her appraisal. Thus, the facts do not support Respondent's assertion that Petitioner herself was the cause of the delay in her performance appraisal being submitted eight months late. It is not clear that Petitioner did not timely submit Ballard's appraisal, but even if we accept the March 1989 submission as her only appraisal for Ballard, that would not account for nor justify the additional three months' delay in Cross submitting Petitioner's appraisal.

Respondent's second argument regarding the timeliness issue is that the time requirements of GAO Order 2430.1 are purely procedural requirements, and procedural rules are not binding on an agency, and therefore, the violation of such a rule cannot constitute a prohibited personnel practice. In the alternative, Respondent argues that, even if the time requirements of GAO Order 2430.1 are binding, these rules do not directly concern, or implement a merit system principle, and therefore, a violation of the rule cannot be a prohibited personnel practice.

Again, I cannot agree with Respondent's logic. It has long been held that procedural rules are binding on the agency promulgating them. Service v. Dulles, 354 U.S. 363, 388 (1957); Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954).

Although the requirement that performance appraisals be completed within 20 days of an employee's release date and that a transferring employee's performance appraisal must be delivered in advance of the employee's arrival at the new duty station may seem technical or merely procedural, they nonetheless are regulations implementing merit system principles. Violation of this requirement is a prohibited personnel practice. That the regulation was violated in such an egregious manner only adds to my view that Petitioner's performance appraisal must be removed and destroyed. The legislative history of the Civil Service Reform Act teaches us that the dominant Congressional objective in the passage of the Act was to reform the manner by which Federal employee performance is appraised and used as a basis for rewarding and penalizing employees. See, H.R. 11280 Report, July 31, 1978; Lovshin v. Department of Navy, 767 F.2d 826 (Fed. Cir. 1985); Wells v. Harris, 1 M.S.P.R. 208 (1979). Employee performance appraisals are to be conducted uniformly, efficiently, and objectively, helping management to utilize employees more fully while informing the employee of what management thinks of the employee's present contribution. Legislative History, S. 2640, at 1664-65 (Senate debate). Timely, accurate performance appraisals are crucial to the merit system principles embodied in Chapters 23 and 43 of Title 5. Wilson v. Department of Health and Human Services, 770 F.2d 1048 (Fed. Cir. 1985); Wells v. Harris, *supra*. Here, the performance appraisal Petitioner received from her supervisor was neither timely nor accurate. Cross admitted in his testimony that the information in the performance appraisal was inaccurate, and that his memory of Petitioner's performance was too vague to be relied upon. Thus, the performance appraisal

deprived Petitioner of her right to "appropriate incentives" for excellence in her performance (See 5 U.S.C. Sec. 2301(b)(3)), while simultaneously depriving the Agency of the ability to use its work force in an effective and efficient manner. (5 U.S.C. Sec. 2301(b)(5)).

Respondent's failure to timely submit Petitioner's performance appraisal skews the entire system of promotions and merit pay, denying the Agency the best performance of the best employees. GAO's failure to enforce its own regulations regarding the timeliness and accuracy of its performance appraisals renders the statutory performance appraisal system meaningless.

It is highly unlikely that one may quantify the effect of a higher performance appraisal on Petitioner's chances for promotion or a salary increase had it been received in a timely fashion. Respondent's failure to comply with the letter and spirit of its own regulations resulted in Petitioner receiving her performance appraisal many months late. This means that Petitioner could not correct the situation in time for the performance appraisal to have the maximum possible positive impact on her promotion and salary increase opportunities. See Bell v. United States, 366 U.S. 393 (1961); Mazaleski v. Treusdell, 562 F.2d 701, 715-20 (D.C. Cir. 1973).

Clearly, Respondent's actions in failing to deliver a timely performance appraisal to Petitioner constitute a violation of the GAO Order 2430.1, and the merit system principles stated in 5 U.S.C. Sec. 2301(b)(3),(4), and (5).

CONCLUSION

Respondent's issuance of Petitioner's performance appraisal in this case is a prohibited personnel practice within the meaning of 5 U.S.C. Sec. 2302(b)(11). Respondent is ordered to destroy the subject performance appraisal.

